UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ADT LLC D/B/A ADT SECURITY SERVICES

and **Cases 03-CA-184936**
03-CA-192545

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 43

GENERAL COUNSEL'S REPLY BRIEF IN SUPPORT OF CROSS-EXCEPTION

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the Acting General Counsel (General Counsel) hereby submits this Reply Brief in response to the answering brief of ADT LLC d/b/a ADT Security Services (Respondent) to General Counsel's cross-exception to the Decision of Administrative Law Judge (ALJ) Michael A. Rosas, dated August 4, 2017, in the above-captioned cases.[1] It is respectfully submitted that in all respects, other than what is excepted to in the General Counsel's limited Cross-Exception, the findings of the ALJ are appropriate, proper and fully supported by the credible record.

I. INTRODUCTION

In its Answering Brief, Respondent makes numerous inaccurate assertions about the law and facts in this matter. Respondent also fails to understand that the General Counsel argued two separate theories under which Respondent violated the Act by imposing a mandatory six-day workweek both for service and installation technicians in the Albany unit, and for service

[1] References to the transcript of proceedings are designated as (Tr. __). References to the General Counsel's Brief to the Administrative Law Judge are designated as (GC Brief to ALJ __). References to the Administrative Law Judge's Decision are designated as (ALJD _:_). References to General Counsel's Exhibits are designated as (GC Ex. __). References to Respondent's Brief in Support of Exceptions to Administrative Law Judge's Decision and in Response to the General Counsel's Cross Exception are designated as (R. Response to GC Cross-Exception __).

technicians in the Syracuse unit. Contrary to Respondent's assertions, the facts and arguments set forth in the General Counsel's Brief in Support of Cross-Exception are supported by the record.

II. ARGUMENT

a. The ALJ properly found that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing employees' terms and conditions of employment

Respondent argues in its Reply Brief in Support of Exceptions to Administrative Law Judge's Decision and in Response to the General Counsel's Cross Exception that this case is solely one of contract interpretation. This assertion is incorrect and is belied by the Amended Consolidated Complaint and Notice of Hearing (Complaint) itself, which alleges separate violations of Section 8(a)(1) and (5) and Section 8(d) of the Act. (GC Ex. 1[n], 1[q]). The General Counsel presented evidence at the hearing that Respondent made unilateral changes in violation of Section 8(a)(1) and (5) of the Act, as well as midterm modifications in violation of Section 8(d) and 8(a)(5) of the Act. The General Counsel addressed in its Brief to the Administrative Law Judge Respondent's unilateral changes and Respondent's unlawful midterm modifications. (GC Brief to ALJ 13, 18).

The ALJ evaluated the evidence of a unilateral change put forth by the General Counsel at the hearing and correctly concluded that Respondent had violated Section 8(a)(5) of the Act by unilaterally changing employees' terms and conditions of employment. (ALJD 12:8-12:22). The ALJ also looked at the contractual provisions the General Counsel argued had been modified during the term of each contract. (ALJD 3:27-4:12). He included the correct remedy for a violation of Section 8(d) of the Act, requiring Respondent to cease and desist from changing employees' terms and conditions of employment without the consent of the Union. (ALJD

12:11-12:17, 13:6-13:14). The ALJ addressed both the 8(a)(5) and 8(d) violations in his conclusions of law and recommended Order. In his conclusions of law, he found that Respondent violated Section 8(a)(5) when it acted both unilaterally *and* without the consent of the Union. (ALJD 12:8-12:9). Similarly, his recommended Order would require Respondent to cease and desist from imposing a six-day workweek both unilaterally *and* without the consent of the Union. (ALJD 13:6-13:14).

b. The ALJ properly concluded that Respondent violated both Section 8(a)(5) and 8(d) of the Act

The ALJ correctly found that Respondent violated both Section 8(a)(1) and (5) of the Act by unilaterally changing employees' terms and conditions of employment. The ALJ applied the correct 8(a)(5) unilateral change standard to determine that Respondent had unilaterally changed employees terms and conditions of employment on a mandatory subject of bargaining. (ALJD 8:21-8:25). Respondent does not dispute that it did not provide the Union an opportunity to bargain over the changes. (Tr. 24-25). The ALJ noted that Respondent's implementation of a mandatory six-day workweek was a "material, substantial, and significant change…and, as such, was a mandatory subject for the purposes of collective bargaining." (ALJD 9:14-9:16). Therefore, Respondent's failure to bargain over the changes constituted a violation of Section 8(a)(1) and (5) of the Act. (ALJD 9:16-9:18).

It is also clear that Respondent violated Section 8(d) of the Act by modifying the terms of both the Syracuse and Albany collective-bargaining agreements. The ALJ considered the language of "the disputed scheduling provisions." (ALJD 3:27-5:2). He further considered Respondent's interpretation of the collective-bargaining agreements, by explaining that Respondent relies on "the argument that Syracuse and Albany Units have always permitted management to…schedule mandatory overtime." (ALJD 8:16-8:19). Finally, the ALJ stated in

his conclusions of law that Respondent acted without the consent of the Union, and included in his recommended Order a provision that would require Respondent to cease and desist from implementing a six-day workweek without the consent of the Union. (ALJD 12:8-12:10, 13:6-13:14). The ALJ correctly recognized that this case includes allegations of unilateral change as well as midterm modification, and included language in his remedy addressing both issues.

This language differs from the ALJ's recommended Order in response to the General Counsel's allegation that Respondent violated only Section 8(a)(1) and (5) of the Act by unilaterally changing terms and conditions of employment for Syracuse installation technicians. There, the ALJ's recommended Order states that Respondent should be required to cease and desist from "refusing to bargain with the Union by making changes to employees' terms and conditions of employment by unilaterally imposing a bi-weekly six-day workweek for the installation technicians in the Syracuse Unit…." (ALJD 12:19-12:22).

Contrary to Respondent's assertion that the ALJ applied the unilateral change standard to a question of midterm contract modification, the ALJ appropriately applied the unilateral change standard to the unilateral change allegations. (ALJD 8:12-8:14, 8:21-9:18). Moreover, the ALJ also addressed the contract modification issue to which Respondent refers, and included in his conclusions of law and recommended Order language recognizing that Respondent changed employees' contractual terms and conditions of employment without the consent of the Union. (ALJD 8:14-8:19, 12:8-12:9, 13:6-13:14). The General Counsel asks only that the Board make the finding of an 8(d) violation which was alleged in the Complaint, litigated at the hearing, briefed to the ALJ, and for which the ALJ provided an appropriate remedy in his conclusions of law and recommended Order. (GC Ex. 1[n], 1[q]; Tr. 25, 54; GC Brief to ALJ 13; ALJD 12:8-12:9, 13:6-13:14).

c. The Board should grant the General Counsel's Cross-Exception and find that Respondent violated Section 8(d) of the Act

The record evidence shows that Respondent violated Section 8(d) when it made midterm modifications to the Albany and Syracuse collective-bargaining agreements. Under the sound arguable basis standard, Respondent would not only need to have an interpretation of the contract, but that interpretation would need to be plausible. The Board determines whether a reason is plausible or not. *Lenawee Stamping Corporation*, 365 NLRB No. 97, slip op. at 7 (June 14, 2017). The Board may interpret provisions of a collective-bargaining agreement where necessary to adjudicate an alleged unfair labor practice. See *NLRB v. Strong*, 631 F.2d 669, 675 (10th Cir. 1980). Respondent asserts that even though both collective-bargaining agreements specify that the work week will consist of four or five days, it had the right to implement a six-day work week. (R. Response to GC Cross-Exception, 5). This interpretation is implausible in light of the actual words used in the collective-bargaining agreements, and in light of the fact that Respondent had never before implemented such a change. (Tr. 54). The ALJ was correct in providing a remedy for a Section 8(d) violation in the ALJD.

"It has consistently been held that an employer acts in derogation of its bargaining obligation under Section 8(d), and thereby violates Section 8(a)(1) and (5) of the Act when, during the period of the contract and without the consent of the union, it modifies…conditions that are mandatory bargaining subjects." *Safelite Glass*, 283 NLRB 929, 939 (1987). Although a violation of Section 8(d) of the Act necessarily also violates Section 8(a)(5) of the Act, and in spite of his inclusion of the words 'without the consent of the Union,' the ALJ did not specify that Respondent's change to terms and conditions of employment was a violation of Section 8(d) as well as a violation of Section 8(a)(5) of the Act. Accordingly, the General Counsel stated in its

Brief in Support of the Decision of the Administrative Law Judge that the ALJ correctly found that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing employees' terms and conditions of employment.

The General Counsel's single cross-exception is limited to a request that the Board find that Respondent separately violated Section 8(d) of the Act. The General Counsel relied on the ALJ's consideration of the modified terms of the contract in the ALJD and the fact that the ALJ included the appropriate 8(d) remedy in his conclusions of law and recommended Order in support of the position that the ALJ's omission of a finding that Respondent violated Section 8(d) in addition to Section 8(a)(5) was inadvertent.

III. CONCLUSION

For all the reasons set forth above, the General Counsel respectfully requests that the Board grant the General Counsel's limited Cross-Exception and issue an appropriate order that Respondent be found to have also violated Section 8(d) of the Act, as discussed above. General Counsel further requests that the Board issue an order otherwise affirming and adopting the Decision and Recommendations of the ALJ.

DATED at Albany, New York, this 2nd day of November, 2017.

Respectfully submitted,

/s/ Alicia E. Pender
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